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CONFISCATION OF PRIVATE PROPERTY

EXTRACT FROM INTERNATIONAL LAW AND SOME CURRENT ILLUSIONS, AND OTHER ESSAYS

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CONFISCATION OF PRIVATE PROPERTY

Of the restriction of the capture and confiscation of private property on land, an early reverberation may be heard in the Peace of the Pyrenees between France and Spain in 1659, of which the twenty-second article significantly declares:

> All goods and merchandise arrested in either of the kingdoms, upon the subjects of the said Lords and Kings, at the time of the Declaration of War, shall be uprightly and bona fide restored to the owners.

In the United States, toward the end of the next century, this rule of uprightness, although assailed, was again vindicated. During the Revolutionary War certain States had passed acts by which it was provided not only that debts due to British creditors should be paid into the local treasury, but also that such payment should bar any future action for their recovery. Debts, it may be superfluous to remark, are merely one form of property; and when the acts, which were essentially confiscatory, came into question during the peace negotiations at Paris, John Adams ended the discussion by bluntly declaring, in the presence of the British plenipotentiaries, that he was "not in favor of cheating anybody." An article was then inserted in the treaty to assure to creditors their appropriate judicial remedies. But, as Federal courts were lacking, and the State courts deemed themselves bound by the local laws, the article proved to be ineffectual; and in order to give it vitality, there was later incorporated in the Constitution of the United States the clause declaring treaties to be the supreme law of the land, binding on the judges in every State, notwithstanding anything in the State constitution laws of the contrary. Under this clause the Supreme Court of the United States held the confiscatory statutes to be invalid,[1] but with little benefit to the creditors. Owing to lapse of time, and to intervening deaths, financial failures and loss of proofs, the judicial remedy against the debtors had become practically worthless; and, under a treaty signed on January 8, 1802, the United States paid to Great Britain the sum of £600,000, or $3,000,000, with which to compensate the creditors for their losses.

This final result may not have been uninfluenced by the memorable and successful defense of the rule of uprightness in the United States in another instance.

In the treaty with Great Britain of 1794, of which John Jay, then Chief Justice of the United States, was the American negotiator, there was the following stipulation:

> Article X. Neither the debts due from individuals of one nation to individuals of the other, nor shares, nor moneys, which they may have in the public funds, or in the public or private banks, shall ever in any event of war or national differences be sequestered or confiscated, it being unjust and impolitic that debts and engagements contracted and made by individuals, having confidence in each other and in their respective Governments, should ever be destroyed or impaired by national authority on account of national differences and discontents.

[1] Ware *v.* Hylton (1796), 3 Dallas, 199.

Of the broad and vital principle from which this article was derived no exposition could be more eloquent or more profound than that which was made by Alexander Hamilton, who, in opening his discussion of the subject, said:

In my opinion this article is nothing more than an affirmance of the modern law and usage of civilized nations, and is valuable as a check upon a measure which, if it could ever take place, would disgrace the Government of the country, and injure its true interests. The general proposition of writers on the laws of nations is, that all enemy's property, wherever found, is liable to seizure and confiscation; but reason pronounces that this is with the exception of all such property as exists in the faith of the laws of your own country; such are the several kinds of property which are protected by this article. And though in remote periods the exception may not have been duly observed, yet the spirit of commerce, diffusing more just ideas, has been giving strength to it for a century past, and a negative usage among nations, according with the opinions of modern writers, authorizes the considering the exception as established. If there have been deviations from that usage in the actual war of Europe, they form no just objection to this reasoning: for this war has violated, in different instances, most of the most sacred laws of nations.[2]

Recurring later to the subject, Hamilton said:

The right of holding or having property in a country always implies a duty on the part of its government to protect that property, and to secure to the owner the full enjoyment of it. Whenever, therefore, a government grants permission to foreigners to acquire property within its territories, or to bring and deposit it there, it tacitly promises protection and security. * * * Property, as it exists in civilized society, if not a creature of, is, at least, regulated and defined by the laws. * * * An extraordinary discretion to resume or take away the thing, without any personal fault of the proprietor, is inconsistent with the notion of property. * * * It is neither natural nor equitable to consider him as subject to be deprived of it for a cause foreign to himself; still less for one which may depend on the volition or pleasure, even of the very government to whose protection it has been confided; for the proposition which affirms the right to confiscate or sequester does not distinguish between offensive or defensive war, between a war of ambition on the part of the power which exercises the right, or a war of self-preservation against the assaults of another.

The property of a foreigner placed in another country, by permission of its laws, may justly be regarded as a deposit, of which the society is the trustee. How can it be reconciled with the idea of a trust, to take the property from its owner, when he has personally given no cause for the deprivation? * * * There is no parity between the case of persons and goods of enemies found in our own country and that of the persons and goods of enemies found elsewhere. In the former there is a reliance upon our hospitality and justice; there is an express or implied safe conduct; the individuals and their property are in the custody of our faith; they have no power to resist our will; they can lawfully make no defense against our violence; they are deemed to owe a temporary allegiance; and for endeavoring resistance would be punished as criminals, a character inconsistent with that of an enemy. To make them a prey is, therefore, to infringe every rule of generosity and equity; it is to add cowardice to treachery. * * * Moreover, the property of the foreigner within our country may be regarded as having paid a valuable consideration for its protection and exemption from forfeiture; that which is brought in, commonly enriches the revenue by a duty of entry. All that is within our territory, whether acquired there or brought there, is liable to contributions to the Treasury, in common with other similar property. Does there not result an obligation to protect that which contributes to the expense of its protection? Will justice sanction, upon the breaking out of a war, the confiscation of a property which, during peace, serves to augment the resources and nourish the prosperity of a state? * * * Reason, left to its own lights, would answer all these questions in one way, and severely condemn the molestation, on account of a national contest, as well of the property as of the person of a foreigner found in our country, under the license and guaranty of the laws of previous amity.[3]

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[2] Works of Alexander Hamilton (Lodge's ed.), Vol. V, p. 160.
[3] Works of Alexander Hamilton (Lodge's ed.), Vol. V, pp. 412-418.

The Jay treaty was duly ratified.

But, in time of war, no principle is ever safe against attack; and, twenty years later, when the second war with Great Britain occurred, an attempt was made to confiscate, through the courts, British private property found on land at the outbreak of hostilities. There was no specific confiscatory statute, but it was claimed that the act of Congress, declaring the existence of a state of war, sufficed to render the property confiscable. The attempt failed. No confiscatory law was ever passed. The decision of the Supreme Court, defeating the attempted confiscation, was delivered by the Chief Justice, John Marshall, who, in the course of his opinion, said that, while war gave to the sovereign "full right to take the persons and confiscate the property of the enemy wherever found," yet the "mitigations of this rigid rule, which the humane and wise policy of modern times" had "introduced into practice," would "more or less affect the exercise" of the right; and that, although this practice could not "impair the right itself," yet it was "not believed that modern usage would sanction the seizure of the goods of an enemy on land, which were acquired in peace in course of trade." Such a proceeding, said Marshall, was "rare, and would be deemed a harsh exercise of the rights of war;" so much so, indeed, that the "modern usage" could not be disregarded by the sovereign "without obloquy." Declaring, therefore, that the "modern rule" was "totally incompatible with the idea that war does of itself vest the property in the belligerent government"; he held that the declaration of war did not authorize the confiscation.[4]

Some years ago I had occasion to comment on Marshall's intimation that the "modern usage," although it would "more or less affect the exercise" of the ancient right, could not "impair the right itself."[5] The distinction between the effect of usage on rights and on the exercise of rights may be of doubtful value. But, however this may be, the intimation was only a dictum; moreover, the distinction between the effect of usage on rights and on the exercise of rights is of doubtful value, and the great Chief Justice twenty years later discarded it when, in the decision of another celebrated case, he declared:

> It is very unusual, even in cases of conquest, for the conqueror to do more than displace the sovereign and assume dominion over the country. The modern usage of nations, which has become law, would be violated; that sense of justice and of right which is felt and acknowledged by the whole civilized world would be outraged, if private property should be generally confiscated, and private rights annulled.[6]

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[4] United States *v.* Brown (1814), 8 Cranch, 110.

[5] John Marshall: An address delivered before the Delaware Bar on February 4, 1901, on the celebration of the hundredth anniversary of Marshall's assumption of the office of Chief Justice. This address was printed in the Political Science Quarterly, vol. 16 (September, 1901), pp. 393–411, and an extract from it bearing on the present question may be found in Moore, Digest of International Law, Vol. VII, pp. 312, 313.

[6] United States *v.* Percheman (1883), 7 Pet. 51, 86. In an action in England under the Legal Proceedings Against Enemies Act, 1915, the question arose as to whether a German partner in an English company, engaged in a manufacturing business, in England, was entitled (1) to a share of the profits made since the dissolution of the partnership by war, or (2) to interest on his share in the partnership assets, or (3) only to the value of his share in the partnership as of August 4, 1914, the date of the beginning of the war. The House of Lords, January 25, 1918, unanimously held that the German partner was entitled to a share of the profits, so far as attributable to the use of his share of the capital. The Lord Chancellor, Lord Finlay, said: "It is not the law of this country that the property of enemy subjects is confiscated. Until the restoration of peace the enemy can, of course, make no claim to have it delivered up to him, but when peace is restored he is considered to be entitled to his property with any fruits it may have borne in the meantime." Said Viscount Haldane: "The law of this country does not in general confiscate the property of an enemy. He can not claim to receive it during war, but his right to his property is not extinguished; it is merely suspended." Lord Dunedin concurred. So, also, Lord Atkinson, who declared that the opposite view was one "which not even the most rabid patriotism can justify." Lord Parmoor remarked that the right of confiscation of enemy property on land in favor of the Crown had "long since been disused." (Hugh Stevenson & Sons, Ltd., Appellants; and Aktiengesellschaft für Cartonnagen-Industrie, Respondents (1918), A. C. 239.)

When John Quincy Adams, as Secretary of State, affirmed that, "by the usages of modern war the private property of an enemy is protected from seizure and confiscation as such," he avowed a belief not more tenaciously held by himself than by many illustrious predecessors and successors. It is therefore not strange that the nonconfiscatory principle pervades the treaties of the United States, which provide that on the outbreak of war citizens or merchants of the enemy may have six months, nine months, a year, or such time as they may require, in which to arrange their affairs and withdraw their property or effects,[7] and, almost as often, that they may remain and continue to trade as long as they behave peaceably, their property and effects meanwhile being exempt from seizure or sequestration.[8] There have, indeed, been Presidents, such as Pierce, McKinley, and Roosevelt, and Secretaries of State, such as Adams, Marcy, Fish, and Hay, who have proposed that even enemy private property at sea be exempt from capture; and such an exemption actually was incorporated in the treaty with Italy of February 26, 1871, when Grant was President, Fish being Secretary of State.[9]

It would be an idle task minutely to analyze the language of the foregoing treaties in order to ascertain whether some particular confiscation might be enacted without flagrant violation of their precise terms. St. Paul's well-known proverb, that "the letter killeth but the spirit giveth life," [10] is equally expressed in the legal maxim *qui haeret in litera haeret in cortice*, meaning that "he who considers merely the letter of an instrument goes but skin-deep into its meaning."[11] No doubt their phraseology may in some instances have been specially designed, like the terms of criminal statutes, to prevent the repetition of particular odious acts. But, without regard to the words employed and their literal interpretation, there can be no doubt that they were understood to emanate from the general rule against confiscation, which it was not supposed that the contracting parties would seek in any respect to infringe. Even by Magna Carta the pre-war property of enemies, though they were not themselves personally present, was not, simply as enemy property, subject to confiscation by the Crown.[12]

Not long after the outbreak of the recent war, the belligerent governments, one after another, proceeded to assume control of, or, as was generally said, to "intern" enemy private property found within their jurisdiction. Individuals and property are "interned" to prevent them from doing harm. In the present instance, the avowed object of taking control of the property was for the time being to prevent its use in the enemy interest, either directly, or as a basis for credits or otherwise. Upwards of six months after entering the war, the Government of the United States,

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[7] Bolivia, 1858, art. 28; Costa Rica, 1851, art. 11; Dominican Republic, 1867, art. 1; Ecuador, 1839, art. 26; Haiti, 1864, art. 3; Honduras, 1864, art. 11; Italy, 1871, art. 21; Morocco, 1836, art. 24; New Granada (Colombia), 1846, art. 27; Nicaragua, 1867, art. 11; Paraguay, 1859, art. 13; Peru, 1887, art. 27; Prussia, 1799, art. 23; 1828, art. 12; Salvador, 1870, art. 27; Spain, 1795, art. 13, which also provides that indemnity shall be made for any injury meanwhile done to them; Sweden, 1783, art. 22, containing a similar stipulation; Tunis, 1797, art. 23.

[8] Argentine Confederation, 1853, art. 12; Bolivia, 1858, arts. 28, 29; Colombia, 1846, arts. 27, 28; Costa Rica, 1851, art. 11; Ecuador, 1839, arts. 26, 27; Haiti, 1864, arts. 3, 4; Honduras, 1864, art. 11; Italy, 1871, art. 21; Nicaragua, 1867, art. 11; Paraguay, 1859, art. 13; Peru, 1887, arts. 27, 28; Salvador, 1870, art. 27.

[9] Art. 12.

[10] Corinthians, II, chap. 3, verse 6.

[11] Broom's Legal Maxims, 8th ed., p. 533, citing Coke's Littleton, 283 b.

[12] F. E. Farrer, The Forfeiture of Enemy Private Pre-War Property: Law Quarterly Review, vol. 37 (1921), pp. 218, 337, 353, 356.

under certain provisions of the "trading with the enemy act," which had just then been passed, embarked on a similar course. This was not, nor did it purport to be, an exercise by Congress of its constitutional power "to make rules concerning captures on land and water." The word "capture" is in law a technical term, denoting the hostile seizure of places, persons, or things. Men in arms are "captured," but a noncombatant is seized or arrested. A defended city, if taken, is said to be "captured"; if undefended, it is "occupied." Property is said to be "captured," only when seized, in a hostile sense, under claim of forfeiture or confiscation. These distinctions are very elementary. The idea of provisionally holding enemy property in custody in order to prevent its use in the enemy interest is by no means new. In England, it is at least as old as Magna Carta. No one understood the act of Congress to contemplate a hostile seizure. The very terms of the act preclude such an interpretation. It merely authorized the provisional holding of the property in custody, and appropriately styled the official, who was to perform this function, the Alien Property Custodian.

In the original statute the function of the Alien Property Custodian was defined as that of a trustee. Subsequently, however, there came a special revelation, marvelously brilliant but perhaps not divinely inspired, of the staggering discovery that the foreign traders and manufacturers whose property had been taken over had made their investments in the United States not from ordinary motives of profit but in pursance of a hostile design, so stealthily pursued that it had never before been detected or even suspected, but so deadly in its effects that the American traders and manufacturers were eventually to be engulfed in their own homes and the alien plotters left in grinning possession of the ground. Under the spell engendered by this agitating apparition, and its patriotic call to a retributive but profitable war on the malefactors' property, substantial departures were made from the principle of trusteeship.

The Preacher has told us that the thing that hath been shall be, that what is done shall be done again, and that "there is no new thing under the sun."[13] So it is in the present instance. Hamilton, in his denunciation of the principle of confiscation, did not overlook those who, as he said, "then defended the confiscation or sequestration of debts as our best means of retaliation and coercion, as our most powerful, sometimes as our only means, of defense"; and, pursuing his protest, he declared:

> But so degrading an idea will be rejected with disdain, by every man who feels a true and well-informed national pride; by every man who recollects and glories, that in a state of still greater immaturity, we achieved independence without the aid of this dishonorable expedient; that even in a revolutionary war, a war of liberty against usurpation, our national councils were too magnanimous to be provoked or tempted to depart so widely from the path of rectitude; by every man, in fine, who, though careful not to exaggerate, for rash and extravagant projects, can nevertheless fairly estimate the real resources of the country, for meeting dangers which prudence can not avert.[14]

Such a man would, said Hamilton, look for the security of the country "in the courage and constancy of a free, brave, and virtuous people—in the riches of a fertile soil—an extended and progressive

[13] Book of Ecclesiastes, chap. 1, verse 9.
[14] Works of Alexander Hamilton (Lodge's ed.), Vol. V, pp. 408–409.

industry—in the wisdom and energy of a well-constituted and well-administered government—in the resources of a solid, if well-supported, national credit—in the armies, which, if requisite would be raised—in the means of maritime annoyance, which, if necessary, could be organized, and with which we could inflict deep wounds on the commerce of a hostile nation"; and would "indulge an animating consciousness, that, while our situation is not such as to justify our courting imprudent enterprises, neither is it such as to oblige us, in any event, to stoop to dishonorable means of security, or to substitute a crooked and piratical policy, for the manly energies of fair and open war." [15]

In the main, the momentous question as to what shall be done with the enemy private property taken over by the United States in the recent war is yet to be determined; and, with more than $3,000,000,000 of the world's supply of gold in the coffers of the Federal reserve system, and continuously tolerated additions to the more than $11,000,000,000 of tax-exempt securities already in private hands, the United States is hardly in a position to put forth the plea of financial stress to excuse or palliate the retention of what it seized.

The subject has also another aspect. During the past 10 years the investments abroad of citizens of the United States have enormously increased, and the process has only begun. Considering the question, therefore, purely as one of selfish calculation, I venture to think it directly contrary to the interests of the United States to resuscitate the doctrine that enemy private property found in a country on the outbreak of war may be confiscated. Such a doctrine might even create a temptation.

But there is yet another and higher reason. The United States has an honorable past as well as an expedient future to consider.

Of all the illusions a people can cherish, the most extravagant and illogical is the supposition that, along with the progressive degradation of its standards of conduct, there is to go a progressive increase in respect for law and morality. Again may we remark that "there is no new thing under the sun." The world never will be rid of the problem of preserving its elementary virtues. Three hundred years ago Grotius declared that as he who violated the laws of his country for the sake of some present advantage to himself, "sapped the foundation of his own perpetual interest, and at the same time that of his posterity," so the people that "violated the laws of nature and nations" broke down "the bulwarks of its future happiness and tranquillity."

No less pertinent is the confession of Alexander Hamilton, made a century and a quarter ago, that serious as the evil of war had appeared to him to be, yet the manner in which it might be carried on was in his eyes "still more formidable." It was, said Hamilton, "to be feared that, in the fermentation of certain wild opinions, those wise, just, and temperate maxims, which will forever constitute the true security and felicity of a state, would be overruled," and that, one violation of justice succeeding another, measures would be adopted which even might "aggravate and embitter the ordinary calamities of foreign war." [16]

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[15] Id., p. 409.
[16] Works of Alexander Hamilton (Lodge's ed.), Vol. V, p. 406.